

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Chapter 13 Case
GENE E. LINTON, JR.)	
)	Number <u>00-42733</u>
<i>Debtor</i>)	
)	
)	
HOUSEHOLD MORTGAGE SERVICES)	
)	
<i>Movant</i>)	
)	
)	
v.)	
)	
)	
GENE E. LINTON, JR.)	
)	
<i>Respondent</i>)	

MEMORANDUM AND ORDER

Gene E. Linton, Jr. (“Debtor”) filed a voluntary Chapter 13 case on October 2, 2000. Household Mortgage Services (“Household”) filed a Motion for Relief from Automatic Stay on August 5, 2003, in order to commence foreclosure proceedings on Debtor’s principal residence. In response, Debtor submitted a Modified Chapter 13 Plan After Confirmation on August 13, 2003. Accordingly, a hearing on Household’s motion for relief and Debtor’s proposal to modify his plan was held on September 30, 2003. This Court

has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(G) over this core proceeding. Pursuant to Federal Rule of Bankruptcy Procedure 7052(a), I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed his voluntary Chapter 13 petition on October 2, 2000, when he was \$2,100.00 in arrears on his mortgage payments to Household. His plan was confirmed on February 27, 2001, and was to last for 48 months. As confirmed, the plan called for monthly payments of \$217.00. In addition, Debtor was required to make monthly mortgage payments to Household of \$479.26.

Household is a secured creditor of Debtor pursuant to a first mortgage Note and Deed to Secure Debt on Debtor's principal residence located at 6 Dixie Street, Port Wentworth, Georgia ("Property"). The Security Deed was dated August 31, 1998, and filed on September 14, 1998. Debtor currently owes approximately \$50,000.00 on his first mortgage to Household. Additionally, there is a second mortgage on the Property in the amount of nearly \$17,000.00. Debtor has listed the value of the Property as \$40,000.00.¹ (Voluntary Petition, Schedule A).

Household's Motion for Relief from Automatic Stay comes before this Court after Debtor has failed to make his mortgage payments since May of 2002 causing him to

¹Household's counsel explained that the loan was made in excess of fair market value because there were two co-makers on the security deed, George Edward Linton and Janet Melissa Linton Jerald.

have a post-petition arrearage of \$8,343.16.² At the time of the September 30 hearing, Debtor had 13 months remaining on his plan. In the modified plan,³ Debtor proposes extending his plan over an additional six months while increasing payments to \$659.00 to cure the post-petition arrearage while maintaining the original dividend to unsecured creditors.

Debtor has pointed to a variety of reasons for his failure to make mortgage payments to Household. First, Debtor's wife became very ill and was required to have major surgery. While Debtor has medical insurance, he was still required to pay between \$4,000.00 and \$5,000.00 for his wife's surgery. Second, in May of 2003 Debtor broke his right ankle and was forced to miss two months of work. Third, Debtor alleges that his checking account was "robbed" and, separately, checks were stolen by a family member. Finally, Debtor said that he thought that his wife was paying all mortgage amounts; however, she was actually only paying the amounts due on the second mortgage.

Debtor works as a fire fighter for the City of Savannah and has maintained his job for 18 years. In his original petition, Debtor reported combined income for him and his wife of \$2,822.33 per month. (Voluntary Petition, Schedule I). In contrast, the same schedule, as recently amended on October 15, shows income of \$3,216.67 per month. (Voluntary Petition, Schedule I (Amended)). While Debtor originally reported \$2,608.00 of

²The arrearage of \$8,343.16 is comprised of 16 mortgage payments of \$479.26, and attorney fees and costs of \$675.00.

³Debtor first submitted a Modified Chapter 13 Plan After Confirmation on August 13, 2003, that was later supplemented on October 15, 2003.

expenses, his amended petition shows only \$2,557.00 of expenses leaving disposable income of \$659.67. (Voluntary Petition, Schedule J (Amended)).

Debtor contends that I should deny Household's motion and instead should allow him to modify his plan pursuant to 11 U.S.C. §1329 in order to cure the post-petition defaults. Debtor relies on Green Tree Acceptance, Inc. v. Hogle (In re Hogle), 12 F.3d 1008 (11th Cir. 1994), for the proposition that this Court has the authority to modify his confirmed Chapter 13 plan to allow him to cure the post-petition defaults even though the amounts relate to a secured claim on his house. Debtor contends the modified plan is feasible because he is no longer paying child support of \$400.00 per month. Instead, he now has custody of the child and is receiving \$200.00. Further, he stated that all modified plan payments will be salary deducted from his paycheck and there is no question that the arrearage will be cured absent the unforeseen and unexpected event that he loses his job.

Household argues that, based on Debtor's budget, Debtor cannot realistically cure the arrearage in a reasonable time as required by Hogle. Additionally, Household believes that there was not a significant, unforeseeable change of circumstances to warrant approval of the modified plan. Finally, Household contends that the Hogle decision did not contemplate or endorse a modification to cure such a severe post-petition default as exists in this situation.

CONCLUSIONS OF LAW

Modification of Plan

In Bunnell v. Union Planters Bank, N.A. (In re Bunnell), No. 02-43707

(Bankr. S.D. Ga. Nov. 20, 2003), I established a framework to be applied when ruling on whether a debtor should be allowed to modify his confirmed plan to cure a post-petition default on his principle residence. The framework was based on the Eleventh Circuit's holding in Hoggle and the "good faith" requirement of §1325(a)(3). The following factors were enumerated:

1. Whether there has been an unanticipated change in circumstances beyond the control of debtor.
2. Whether that change in circumstances is sufficient to explain the magnitude of the arrearage that has accumulated post-petition.
3. Whether there is equity in the property sufficient to protect the creditor's interest during a reasonable period of time that is necessary to cure the post-petition arrearage.
4. Whether the debtor has the ability to meet the obligations of the modified plan while continuing current payments on the mortgage.
5. Whether a motion for relief on the property in question was granted in the current or a prior case, or other circumstances exist to suggest that the modification is a bad faith effort intended to frustrate the creditor's remedies.

Based on the foregoing factors, I hold that Debtor's proposed modification should be denied.

1. Unanticipated Change in Circumstances

Debtor has provided this Court with a variety of reasons to explain his post-petition arrearage. In regard to the requirement of changed circumstances, the Hoggle court

stated that “[t]he House Report suggests that modification is permissible where problems such as a ‘natural disaster, a long-term layoff, or *family illness or accidents with attendant medical bills*’ prevent compliance with the original plan.” 12 F.3d at 1011 (*citing* H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 125 (1977)) (emphasis added). Here, the illness of Debtor’s wife and his broken ankle are certainly circumstances that justify Debtor’s motion to modify.

2. Extent of Change in Circumstances

While Debtor has exhibited an unanticipated change in circumstances, such change was not of a sufficient magnitude to justify the substantial arrearage that was accumulated over more than a year. Presuming that Debtor did incur \$4,000.00 to \$5,000.00 of unanticipated medical expenses, this fact alone does not fully explain the \$8,343.16 arrearage amount that was incurred while missing 16 consecutive mortgage payments. Further, Debtor did not provide this Court with any estimates as to how much income, if any, he lost because of his broken ankle. Missing 16 mortgage payments and accumulating a post-petition arrearage that is over 20% of the value of the property is very substantial. I am mindful of the fact that, “Chapter 13's overall policy is to facilitate adjustments of the debts of individuals with regular income through flexible repayment plans.” Hoggle, 12 F.3d at 1010. However, to reap the benefits of the flexibility of the Bankruptcy Code, a debtor must exhibit the intent and ability to comply with the terms of his or her confirmed plan. Based on the facts of this case, I hold that Debtor has made only a marginally sufficient showing that unanticipated changed circumstances fully justify the substantial arrearage amount.

3. Equity in the Property/Time Necessary to Cure Arrearage

Debtor not only does not have equity in the Property, the amount of debt on the Property far exceeds the current fair market value. The value is \$40,000.00 whereas the first mortgage to Household exceeds \$50,000.00. In addition, there is a second mortgage of \$17,000.00. Allowing Debtor to modify his plan would disrupt the Bankruptcy Code's "balance of protections." Mendoza v. Temple-Inland Mortgage Corp. (In re Mendoza), 111 F.3d 1264, 1269 (5th Cir. 1997) (holding that bankruptcy court may modify confirmed Chapter 13 plan to include post-petition mortgage arrearage).

Courts must, to abide by Congressional policy, afford home lenders protection in order to "encourage the flow of capital into the home lending market." Nobelman v. American Savings Bank, 508 U.S. 324, 332, 113 S.Ct. 2106, 2111-12, 124 L.Ed.2d 228 (Stevens, J., concurring) (*citing* Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236, 245-46 (5th Cir.1984)). Here, it is clear that allowing Debtor to cure over 18 months, "not only delays payment to the creditor, it increases the cost of the financing to the Debtor because interest accrues on the unpaid balance for the entire cure period." In re Binder, 224 B.R. 483, 488 (Bankr. D. Colo. 1998) (not allowing debtor to modify plan to cure mortgage defaults over 52 months). Most critically, there is absolutely no equity to protect the lender during any extended cure period. Thus, the lack of equity compels a denial of Debtor's proposed modification to cure the arrearage over approximately 18 months.

4. Feasibility

Debtor has proposed increasing his plan payments by \$442.00, from \$217.00 to \$659.00. The increased payments would be made over at least 18 months and total payments into the plan will increase by over \$8,000.00. Under such a scenario, Household would be paid. However, after considering all of the facts, I hold that Debtor has not satisfied his burden of proving that he will, in fact, be able to satisfy both the obligations of the modified plan as well as the ongoing mortgage payments.

In his modified plan, Debtor proposes increasing his plan payments by over 200%. Further, he must maintain the increased payments while staying current on his first and second mortgages. In the September 30 hearing, Debtor testified that his net income had increased by \$600.00⁴ by virtue of the fact that he no longer had to pay child support and is instead receiving child support. However, the child in question now lives with Debtor which likely negates all of the “savings”. Debtor has presented no other evidence that supports the notion that he has the ability to make increased monthly plan payments of \$659.00 while staying current on his first and second mortgage which he has been unable to do in the past. Thus, Debtor has failed to prove that he has the ability to make the very significant plan payments that he has proposed.

5. Good Faith/Prior Relief from Stay

Debtor here did not have a prior bankruptcy case and Household has not

⁴The \$600.00 increase is comprised of a reduction in alimony of \$400.00 and the receipt of \$200.00 in alimony from his ex-spouse.

previously been granted relief from stay. Further, Household has conceded that, “good faith is not an issue since the Debtor desires to retain his residence after some recent setbacks.”

Household’s Memorandum of Law, October 14, 2003, p. 4.

6. Conclusion

After considering the amount of the post-petition arrearage, number of consecutive payments missed, lack of equity in the property, and lack of feasibility I deny Debtor's proposed modification.

Motion for Relief from Stay

Having determined that Debtor is not entitled to modify his confirmed plan, it is necessary that I rule on Household's Motion for Relief from Stay. 11 U.S.C. § 362(d) sets forth the grounds for such relief and provides in relevant part that:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

The party seeking relief from the automatic stay is required to establish a prima facie case of cause for relief. *See e.g. In re Cambridge Woodbridge Apartments, L.L.C.*, 292 B.R. 832, 841 (Bankr. N.D. Ohio 2003); *In re Robinson*, 2002 WL 31685731, *3 (Bankr. E.D. Pa. 2002). If the creditor establishes a prima facie case, the burden shifts to the debtor to prove adequate protection. 11 U.S.C. § 362(g).

Here, Household has satisfied its initial burden by showing that Debtor has missed the last 16 mortgage payments. Failure by the debtor to make mortgage payments can, under some circumstances, constitute §362(d)(1) cause. See Ellis v. Parr (In re Ellis), 60 B.R. 432, 435 (9th Cir. BAP 1985) (holding that bankruptcy judge's determination that failure to make post-confirmation payments constituted cause for terminating automatic stay was not clearly erroneous); Equitable Life Assurance Society v. James River Assoc. (In re James River Assoc.), 148 B.R. 790, 797 (E.D. Va. 1992) (holding that bankruptcy court did not err in granting relief from automatic stay for failure to make monthly payments); In re Morysville Body Works, Inc., 86 B.R. 51, 57 (Bankr. E.D. Pa. 1988) (motion for relief denied without prejudice where there still existed substantial equity cushion in property). I hold that the failure by Debtor to make 16 post-petition mortgage payments is sufficient to constitute cause under §362(d)(1).

While Household has satisfied its burden, Debtor has not made a showing of adequate protection. As discussed, the amount of debt on the Property exceeds the market value by approximately \$27,000.00. This figure is quite significant considering the fact that the Property is only worth \$40,000.00. Accordingly, it is appropriate to grant Household's Motion for Relief from Stay under these circumstances.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS
THE ORDER OF THE COURT that Debtor's Proposed Modified Chapter 13 Plan is
DENIED and Household's Motion for Relief from Stay is GRANTED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of December, 2003.